Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

HOWARD ROSS,
Petitioner(Appellant-Plaintiff) Pro Se

v.

The estate of J.W. Edwards,
Clara Edwards,
Defendants
and
William Ford, Lois Ford,
The United States Department
of Agriculture,

Respondents
(Appellees-Defendants)

On Petition For Writ Of Certiorari
To The United States Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI (FOR SUPERVISORY CONTROL)

Howard Ross/Pro Se
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39 pp

QUESTION PRESENTED

The U.S. Court of Appeals decided the *pro se* appellant's case based on an argument he did not provide (the gratuitous nature of a payment). That issue was provided by the lower court's magistrate in his report in what he termed "seems" to be the argument. Objection to the report was timely filed and the appellant's brief made no mention of the argument of gratuity (Appendix E). The Court dismissed the appeal because they didn't believe a reasonable fact finder could find for the argument which they themselves had constructed.

While the Court of Appeals is permitted wide latitude in the construction of the allegation of a *pro se* appellant, is that appellant still master of the law and arguments he wishes to bring on appeal - can that Court construct an argument so deviant from the appellant's original argument as to make it incredible and then allow that same Court to deny the appeal of a summary judgement by declaring that no reasonable fact-finder could find the court modified allegation. Is such alteration de facto random prohibition of an unincarcerated *pro se* appellant's access to the Court of Appeals to argue the merits he chooses, and abuse of its discretion - do unincarcerated *pro se* appellants have the same rights and access to the Court of Appeals as the imprisoned.

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OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A and is unpublished.
The report and recommendation of the United States District Court Magistrate (First Defendant) appears at Appendix B and is unpublished.
The memorandum opinion and order of the United States District Court Judge (First Defendant) appears at Appendix C and is unpublished.
The memorandum opinion and order of the United States District Court Magistrate (Other Defendants) appears at Appendix D and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided the case was February 4, 2002. A timely petition for rehearing was denied by the United States Court of Appeals on June 4, 2002, and a copy of the order denying rehearing appears at Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rules of Civil Procedure - Rule 8(f): Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Title 28 U.S.C. §1654: Appearance personally or by counsel. In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

STATEMENT OF THE CASE

Prior to Federal Court Proceedings:
The Appellant/Plaintiff Ross purchased real property at a second mortgage foreclosure sale that was encumbered by a first mortgage to Appellee/Defendant United States Department of Agriculture (USDA- referred to in other documents as FmHA and FHA). The Alabama statutory right of redemption of that foreclosure was assigned to Defendant Edwards who then proceeded, on his own without an attorney, to pay off the first mortgage at the local USDA office to relieve the property (inwhich he had an interest) from its encumbrance without at that time any agreement, request or suggestion that he was purchasing the mortgage or that it be assigned. Edwards then filed a complaint in equity in Alabama court against Ross to exercise his right of redemption. Nothing more was said of the first mortgage or its payments until six months later when Edwards, with counsel, obtained a document from the USDA purporting to be an assignment of that mortgage to him. The Alabama court, empowered to adjust all the equities of the parties regarding the property, subsequently entered judgement for Edwards for redemption - giving Edwards a credit on the redemption amount for the payoff of the first mortgage but not subrogating them to USDA. Ross filed an appeal disputing the computation of the amount required to redeem While waiting for response on that appeal, Edwards conducted a foreclosure sale of the first mortgage and purchased the property. Edwards never exercised his right of redemption. The property was subsequently sold to Appellee/Defendant Lois Ford (Ford) who granted another mortgage to the USDA. Ross filed the current complaint, within ten years of that foreclosure, in Alabama court claiming that the mortgage that was foreclosed had been paid off by Edwards and not lawfully assigned, and seeking to

recover possession of the property, clear title in his name, and remove the encumbrance of the new USDA mortgage.

Federal District Court:
That case was removed to the Federal District Court by the USDA. Edwards, who no longer had an interest in the property, filed a motion for summary judgement and Ross answered with two arguments. The first that the assignment was invalid because it didn't comply with the code of federal regulations (CFR) and the second that the mortgage had previously been paid off by Edwards without any contemporaneous agreement to assign, making any subsequent assignment void. The magistrate entered a report in favor of the motion, adding on his own initiative that the "Plaintiff's second argument seems to assume that the payment of the mortgage by Edwards was done without consideration by the FHA or that the payment was gratuitous." The report also went into extensive detail to explain why the case should be barred by the statute of limitations. A timely objection to the report was filed by the plaintiff, preserving his right to appeal. The district judge entered an opinion adopting the magistrate's report, based on the assignment of the mortgage, but on different grounds, changing the rationale of the validity of the assignment by interjecting, again on his own initiative (without either party's pleadings or argument), a claim of subrogation stating that "Under Alabama law, the payment of the underlying debt caused the Edwards to become subrogated to the rights of the mortgage. This is true because subrogation arises as a matter of law and equity whenever one party pays the debt or encumbrance of another either at the request of the other or in order to preserve his own property or assets." (District Judge's Memorandum Opinion, page 4). The case against Defendant Edwards was dismissed and Appellant/Defendants Ford and USDA subsequently filed a second motion for

summary judgement on the same grounds. The Appellant/Plaintiff filed an answer to the new motion with additional evidence and argument in opposition. (Docket Sheet item No. 33). The magistrate, with consent jurisdiction, entered an opinion and order granting the motion, however, stating that "The plaintiff has not filed any evidence or argument in opposition." to the second motion.

U.S. Court of Appeals:
The Appellant/Plaintiff filed an appeal against Ford and USDA (see Appendix E) with a brief arguing against the assignment, on the same two issues, and assigning error to the magistrate judge for abuse of discretion for not allowing the additional answer and evidence of the plaintiff in his answer to the second motion for summary judgement. Neither argument contained any allegation that Edwards' payment was gratuitous (nor was that argument suggested in any of the defendants' briefs or the plaintiff's reply brief or complaint). (There was also argument over the magistrate's issue of statute of limitations, but that was never addressed by the district court judge or the appeals court and the appellant/plaintiff has no idea of any final ruling). Every item in the appellant's statement of facts referenced evidence in the record, including the evidence that the magistrate believes was not filed.The two appellee/defendants filed briefs opposing the admission of the additional answer and evidence - but nowhere claiming that the plaintiff had argued that the payments were gratuitous.The U.S. Court of Appeals, regarding what it called Ross's first argument, affirmed the order in an unpublished opinion that did not find the complaint frivolous or vexatious, but still adopted what the magistrate said "seems" to be the second argument (gratuity), and holding that "While it is undisputed that the Edwardses' paid the mortgage debt, no reasonable fact-finder could find that this payment was made gratuitously on

Markham's behalf. Therefore the Edwardses' payment did not extinguish the mortgage." That was never the legal argument of the complaint or appeal (nor was it part of the district judge's opinion). Rather, the appellant contested the legality of the assignment and argued that while the defendants might be entitled to subrogation of the mortgagee, as the district court judge had proposed, that judge should not have argued it on his own initiative without the defendants asserting that right in their pleadings in some court of equity somewhere so there would be a chance for a proper response and application – one does not become subrogated *ipso facto*. Nor did the Court of Appeals respond to the issue of abuse of discretion for not allowing the plaintiff's answer and evidence in reponse to the defendants' second motion.

REASONS FOR GRANTING THE PETITION

This petition is not for review of the merits of the petitioner/appellant/plaintiff's case that was adjudicated by the Federal District Court. Rather, it asks the Supreme Court to invoke its supervisory control of the Eleventh Circuit Court of Appeals to provide statutory due process by requesting that circuit review the petitioner's appeal on the arguments he has presented and not those that that Court seems to infer. He further believes that Court of Appeals is able to decide the issues as advanced by the parties once they are properly addressed.While the petitioner believes the holding of the CFR section is in error as well as the failure to recognize the differences in state law regarding assignment versus subrogation, he believes they are peculiar to this case and not of national importance.

Inasmuch as the magistrate's report states that the plaintiff's argument "seems to assume" that the payment was gratuitous, that must be a judicial construction of the

argument that doesn't exist without the magistrate's "seeming". By holding that Ross's first argument is that the "payment was made gratuitously", the Court of Appeals is using the magistrate's construction. In interpreting Federal Rule of Civil Procedure 8(f), the Supreme Court has ruled that inorder to do substantial justice federal courts have wide latitude in the construction of *pro se* pleadings and allegations. See Hughes v. Rowe, 101 S.Ct. 173 (1980), Haines v. Kerner, 92 S.Ct. 594 (1972). Those constructions should not be made to deviate so much from the original as to change the legal argument of the complaint. "Of course, the party who brings a suit is master to decide what law he will rely upon," Oliver Wendell Homes in The Fair v. Kohler Die, 33 S.Ct. 410 (1913). The tenth circuit has ruled that while *pro se* pleadings are construed liberally, the court does not assume the role of advocate and draw its own conclusions from allegations that are not supported by the facts presented. See Mapp v. Dovala, 138 F.3d 1335 (10th Cir. 1998). ""Among the cardinal principles of our Anglo-American system of justice is the notion that the legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded *sua sponte* by the trial judge." *Doubleday and Co. v. Curtis*, 763 F.2d 495,502 (2nd Cir. 1985).", GJR Investments v. County of Escambia, 132 F3d 1359 (11th Cir. 1998). "Although courts must construe *pro se* complaints liberally, see *Pena v. Gardner*, 976 F.2d 469,472 (9th Cir. 1992), courts should not undertake to infer in one cause of action when a complaint clearly states a claim under a different cause of action.", Bogovich v. Sandival, 189 F.3d 999 (9th Cir. 1999). The second circuit has ruled that when *pro se* pleadings and allegations are construed they should be interpreted to present the strongest argument for the *pro se* party. See Lernan v. Board of Elections of the City of New York, 232 F.3d 135 (2nd Cir. 2000), Cruz v. Gomez, 202 F.3d 593 (2nd

Cir. 2000), Graham v. Henderson, 89 F.3d 75 (2nd Cir. 1996). And if ambiguous, to be construed in favor of the *pro se* litigant. See Tapia-Ortiz v. Doe, 171 F.3d 150, 152 (2nd Cir. 1999). In the present case the Court of Appeals has followed a construction of the appellant/plaintiff's allegation in a manner that caused his appeal to be dismissed for being incredible. That has to be, instead, the weakest argument one could make for a *pro se* party. While rule 8(f) appears to promote justice and a fair sense of due process, "Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." Boddie v. Connecticut, 91 S.Ct. 780, 787 (1971).

Title 28 U.S.C. $ 1654 provides for *pro se* representation in all United States Courts, including district court and courts of appeals. See Faretta v. California, 95 S.Ct. 2525(1975), Procedural Due Process Rights of Pro Se Litigants, 55 University of Chicago Law Review p.659 (Julie Bradlow1988). "No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." Boddie v. Connecticut, Supra, at 787. In Societe International, ETC. v. Rogers, 78 S.Ct. 1087, 1094 (1958), the district court had dismissed the case by exercising its powers under the federal rules because of circumstances not within the plaintiff's control. The Supreme Court reversed, on reviewing prior due process opinions, ruling that "These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. Cited in

Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982). "Terminating potentially meritorious claims in a random manner is hardly a practice in line with our common-law traditions." Logan v. Zimmerman, Id., at 1158 footnote 10. Because of the change in the district court judge's opinion from the magistrate's for the grounds for validating the assignment to subrogation, then followed by the magistrate's opinion after the second motion for dismissal that erroneously stated "The plaintiff has not filed any evidence or argument in opposition", then followed by the Court of Appeals alteration of the argument of the appellant's brief, and the appellant's lack of clearvoyance, he has always had to wait for the next step in the proceedings to challenge the last court holdings - finally resulting in the monumental task of writing a *pro se* petition that convinces the U.S. Supreme Court to grant the highly elusive *certiorari*. That is not fair and cannot be a due process.

NATIONAL IMPORTANCE

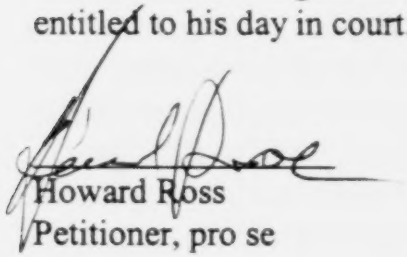
This case is of national importance because it establishes the limits of the alterations to pleadings and arguments the appellate courts can apply before the case is distorted beyond the party's intention - *pro se* or not. Further it defines the right of all *pro se* parties to have meaningful appeals of civil cases on the issues they choose without random dismissals, even if they are unfortunate enough to afford the filing fee and not be incarcerated. Most people, especially attorneys in the appellant's local community, seem to believe in this right without having to first go to jail. If it is unfounded, a ruling by this Court, instead of hiding behind unpublished opinions, will clarify that perception, especially for ordinary Americans who believe they have that right, and allow for debate and agitation for statutory changes. While it is hard to believe that Congress intended the CFR be used as a method

to foreclose on USDA backed homes, it is clear that the disposition of one home is not of national importance to the federal government, so the Supreme Court is not asked to review the holdings of any state law. Rather, this petition objects to the process followed by the Court of Appeals as it affects an entire class of similarly situated appellants and their rights. While this Court isn't being asked to monitor one of the circuits, it is being asked to set the example of how far the circuits can go before they are denying due process. If the case was so simple to review that it didn't warrant a published opinion, then why were the opinions of the magistrate and district judge based on different grounds and whatever happened to the magistrate's issue of the statute of limitations?

CONCLUSION

The appellant has a clear and undeniable right to the relief requested and has no other remedy available. The case should be remanded to the Eleventh Circuit Court of Appeals with instructions to review the briefs based on the appellant's own unmodified issues and arguments so that it may decide whether there is a genuine issue for trial and the plaintiff entitled to his day in court.

Respectfully submitted,



Howard Ross
Petitioner, pro se

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14061
D.C. Docket No. 98-02683-CV-TMP-NE

HOWARD S. ROSS, Plaintiff-Appellant

versus

LOIS FORD, Individually, U.S. DEPARTMENT OF AGRICULTURE, et al.,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Alabama
(February 4, 2002)

Before CARNES, HULL, and COX, Circuit Judges.

PER CURIAM:

Howard S. Ross appeals a grant of summary judgment in favor of Lois Ford and the United States Department of Agriculture ("USDA") on his claims for unjust enrichment and possession of real property.

David Markham owned a parcel of real property subject to two mortgages. When the second mortgage was foreclosed, Ross purchased the parcel at the foreclosure sale. In 1987, J.W. and Clara Edwards obtained an assignment of the first mortgage from the Farmers Home Administration (:FmHA"), the first mortgagee. Soon thereafter, the Edwardses foreclosed the mortgage and sold the property to themselves at a foreclosure sale. They later sold the property to Ford.

Ross contends that the foreclosure was invalid for one of two reasons. First, he argues that the mortgage was extinguished prior to the foreclosure because the underlying debt had been paid by the Edwardses. Second, he argues that, if the mortgage did exist, it was improperly assigned to the Edwardses.

Regarding Ross's first argument, the payment or satisfaction of a real property mortgage debt on behalf of a mortgagor generally extinguishes the mortgage under Alabama law. *See* Ala. Code $ 35-10-26 (1991); *Boyd v. Braham*, 414 So. 2d 931, 933 (Ala. 1982); *Bowden v. Turner*, 24 So. 2d 428, 430 (Ala. 1945). While it is undisputed that the Edwardses' paid the mortgage debt, no reasonable fact-finder could find that this payment was made gratuitously on Markham's behalf. Therefore, the Edwaedses' payment did not extinguish the mortgage.

As to Ross's second argument, the assignment of the FmHA mortgage was governed by 7 C.F.R. $ 1965.128, which reads as follows:"When a borrower requests it, with the advice and instructions from OGC, the note(s) and security instrument(s) may be assigned on a nonrecourse basis to a third party, who has paid the borrower's account in full." 7 C.F.R. $ 1965.128 (1987). While the assignment was requested by the Edwardses, it was done with Markham's consent, which was communicated to FmHA. Markham's consent constituted a valid request for assignment. Since the Edwardses had paid Markham's first mortgage debt in full, FmHA was authorized to assign the mortgage to the Edwardses.

The district court's grant of summary judgment in favor of Ford and USDA is affirmed.

AFFIRMED

A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14061 BB

HOWARD S. ROSS, Plaintiff-Appellant

Versus

LOIS FORD, Individually, U.S. DEPARTMENT OF AGRICULTURE, ANN M. VENEMAN, in her official capacity as Secretary of Agriculture, et al.,

Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Alabama

Before: CARNES, HULL, and COX, Circuit Judges,

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED. FILED
ENTERED FOR THE COURT:
U.S. COURT OF APPEALS

ELEVENTH CIRCUIT
S/E.R.COX
JUN 04 2002
UNITED STATES CIRCUIT JUDGE
THOMAS K KAHN CLERK

A

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HOWARD S. ROSS , Plaintiff
v. Case No.CV-98-TMP-2683-NE
J.W. EDWARDS, et al., Defendants,

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before this court on the motion for summary judgement filed on October 29, 1999, by the Estate of J.W. Edwards and by Clara Edwards ("the Edwards"). Plaintiff Howard Ross responded on November 18, 199, and defendant replied on November 24, 1999. The parties have not consented to the exercise of jurisdiction by the undersigned magistrate judge pursuant to 28 U.S.C. $ 636©; accordingly, the undersigned submits this report and recommendation.

Undisputed Facts

This action arises from a dispute over the rights to a parcel of real property in Madison County, Alabama. The property was originally owned by David Markham, who signed a note and granted a first mortgage to the Farmers Home Administration ("FHA") in 1973. Markham also granted a second mortgage on the property to Family Credit Services. Both mortgages were recorded in the Office of the Probate Judge in Madison County.

In 1986 Markham defaulted on the second mortgage, and Family Credit services foreclosed on the property. At the foreclosure sale on July 30, 1986, the plaintiff, Howard

Ross, purchased the property, which remained subject to the first mortgage.

On February 27, 1987, the defendants, Edward (now deceased) and Clara Edwards, acquired Markham's right of redemption. The Edwards attempted to redeem the property and filed an action in state court in July of 1987 to settle a dispute over the amount of the redemption. The Circuit Court of Madison County declared the right of redemption and set the amount at $11,395.04. Ross appealed, and the appeal was denied by the Alabama Supreme Court. The Edwards never exercised their right to redeem the property, however, and never paid the $11,395.04.

In November of 1987, Markham requested that the FHA assign the first mortgage to the Edwards. It is not clear whether Markham made the request in writing, but it is undisputed that the assignment, In order to effectuate the assignment, the Edwards were required to pay the balance of the mortgage in full. Subsequently, the Edwards foreclosed on the property and purchased it at a foreclosure sale. The foreclosure deed was recorded on September 15, 1988.

In 1996, the plaintiff brought an action in this district, Ross v. Edwards, et al., Civil Action Number 96-C-2482-NE, against Clara Edwards and other defendants to recover the propeerty and rents and profits. After the plaintiff failed to attend a scheduled planning meeting, the case was dismissed without prejudice by order dated July 29, 1997. On September 10, 1998, the plaintiff filed the instant action against both Clara Edwards and the estate of her husband, as well as other defendant

II. Summary Judgement Standard

Under Federal Rule of Civil Procedure 56©, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R, Civ. P. 56©. The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317,323 (1986) (quoting Fed. R. Civ. P. 56©). The movants can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. Celotex, 477 U.S. at 322-23. There is no requirement, however, "that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." Id. at 323.

Once the moving party has met his burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions of file,' designate 'specific facts showing there is a genuine issue for trial.'" Id. at 324 (quoting Fed. R. Civ. P. 56(e). The nonmoving party need not present evidence in a form necessary for admission at trial; however, he may not merely rest on his pleadings. Celotex, 477 U.S. at 324. "[T]he plain language of Rule 56© mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

After the plaintiff has properly responded to a proper motion for summary judgement, the court must grant the motion if there is no genuine issue of material fact and the

B

moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56©. The substantive law will identify which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. His guide is the same standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-252; see also Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 745 n.11 (1983). However, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. Ltd. V. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgement may be granted. Anderson, 477 U.S. at 249 (citations omitted); accord Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. Anderson, 477 u.s. AT254; Cottle v. Storer Communication, Inc., 849 F.2d 570, 575 (11th Cir. 1988). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the non-movants is to be believed and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255. The non-movant need not be given the benefit of every inference but only of every reasonable inference. Brown v. City of Clewiston, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988).

B

III. Defendant's Motion for Summary Judgement

The Edwards seek summary judgement on all of the plaintiff's claims, asserting that: (1) plaintiff's claims are untimely and are barred by the applicable statute of limitations and by the legal doctrine of laches and (2) the plaintiff's claims are without merit because the defendants properly foreclosed on the property. In response to the defendant's motion, argument and evidence, the plaintiff offers no evidence, but instead offers legal arguments that the assignment of the FHA mortgage was void because (1) the assignment was not requested in writing and was not consented to by the plaintiff; and 92) the Edwards paid the debt to the FHA, thus extinguishing the security interest an making the assignment a nullility.

A. Statute of Limitations

The plaintiff does not dispute that this action is an action for the recovery of land, and is governed by Alabama Code $ 6-2-33, which sets forth a 10-year statute of limitations. Plaintiff also does not dispute that this action accrued when the assignment of the FHA mortgage to the Edwards was recorded on February 18, 1988. The instant action was filed on September 10, 1998, more than ten years after the cause of action accrued. Plaintiff does not offer any evidence or argument relating to the statute of limitations defense set forth by the defendants.

The court finds that the plaintiff's cause of action accrued no later than February of 1988, when the assignment of the mortgage was recorded and the plaintiff had constructive knowledge of the assignment. The court further notes that the plaintiff originally filed an action against these defendants within the ten-year period, but that the plaintiff failed to prosecute that action and it ultimately was dismissed without

prejudice. Plaintiff does not assert that the first action served to toll the running of the statute of limitations, and this court sees no basis upon which such a finding could be grounded,

Defendants assert that Alabama Rule of Civil Procedure 15© does not apply here, and the court agrees that the rule does not apply in this case, but for a different reason. The complaint at issue is not an amended complaint; it is a separate action and cannot "relate back" to a complaint filed two years earlier. A contrary finding would allow a plaintiff to endlessly extend the statute of limitations by filing complaints, allowing them to be dismissed without prejudice, and then refiling.

Finally, the court notes that Alabama has no "savings statute" that would toll the limitations period during the pendency of the first action. See Peterson v. BMI Refractories, 132 F.3d 1405, 1414 n.7 (N.D. Ala.1998). In Peterson, the second action was deemed timely and the statute of limitations was tolled, but only because the second action was a "refiling" of the first action and the dismissal was involuntary and without notice to the plaintiff. Id. At 1414. In Peterson, the plaintiff refiled the action within just a few days of the order of dismissal. In the instant case, plaintiff did not file the instant action until September 10, 1998, more than a year after the first complaint was dismissed for plaintiff's own inaction. While that dismissal cannot be deemed voluntary, the court gave notice to the plaintiff four months before dismissing the case.

The facts of the instant case are easily distinguished from the facts of Peterson, and the instant case should be barred by the applicable statute of limitations. Consequently, the statute of limitations applies to bar all of the plaintiff's claims seeking the recovery of the Madison County property and defendants' motion for summary judgment is due to be granted.

B. Defendants' Foreclosure on the Property

Defendants assert that they are entitled to summary judgement on all of the plaintiff's claims for the additional reason that the foreclosure on the property was proper and, therefore, the plaintiff has no remaining interest in the property. The plaintiff, in opposition, argues that the assignment of the first mortgage is null and void because (1) Markham allegedly did not request the assignment in writing, and (2) the assignment was made subsequent to the payment of the mortgage balance, which extinguished the note and security interest.

The defendants assert that the assignment of the first mortgage was done in compliance with the relevant federal Department of Agriculture regulation, 7 C.F.R. $ 1965.128, and is thereby valid and enforceable. The court agrees. The version of the regulations that was in effect at the time of the assignment did not require that the assignment be in writing. The 1995 regulation relied upon by the plaintiff was not in effect at the time of the transaction. Defendants have offered evidence that Markham both requested the assignment and consented to it. In addition, defendants have shown that the assignment was made in return for valuable consideration. Consequently, the assignment was proper and defendants are entitled to summary judgment on plaintiff's claims.

Plaintiff's second argument seems to assume that the payment of the mortgage by the Edwards was done without consideration by the FHA or that the payment was gratuitous. However, the defendants have demonstrated (and common sense informs) that the assignment was given in consideration for the payment of the mortgage. Consequently, the assignment cannot have extinguished the rights or obligations that flowed from the mortgage, as the plaintiff asserts. Because this additional argument by the plaintiff is without merit, the defendants are entitled to summary judgment on plaintiff's claim.

IV. RECOMMENDATION

Based on the foregoing undisputed facts and legal conclusions, the magistrate judge RECOMMENDS that the motion for summary judgment filed by the Edwards be GRANTED and this action against Clara Edwards and the Estate of J.W. Edwards be DISMISSED WITH PREJUDICE.

Any party may file specific written objections to this report and recommendation within fifteen(15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The Clerk is DIRECTED to serve a copy of this order upon counsel for all parties.

DATED this 27 day of March, 2000.

S/T.MICHAEL PUTNAM
T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HOWARD S. ROSS , Plaintiff
v. Case No.CV-98-S-2683-NE
J.W. EDWARDS, et al., Defendant,

MEMORANDUM OPINION

APPENDIX C

This cause came before the court on the motion for summary judgement filed October 29, 1999, by the defendants, Clara Edwards and the Estate of J.W. Edwards (the Edwards). The magistrate judge filed his report and recommendation on March 27, 2000, recommending that the motion for summary judgment be granted and the claims against the Edwards be dismissed with prejudice. Plaintiff filed objections to the report and recommendation on April 11, 2000.

In essence, the plaintiff makes three objections: (1) that the statute of limitations began to run on the date the foreclosure deed was recorded, not on the earlier date the mortgage assignment was recorded; 2) that the defendants did not offer any evidence to support their assertion that the mortgagor consented to the assignment; and (3) that the assignment was invalid because the payment of the mortgage preceded the assignment and thus extinguished any interest the mortgagee held in the property.

The court notes that the plaintiff raises the statute of limitations argument for the first time in his objections to the report and recommendation. In his response to the motion for summary judgement, the plaintiff failed to dispute the defendants' assertion of the statute of limitations as a bar to the claims. In his objections to the report and recommendation, however, the plaintiff argues that the limitation period should have been deemed to begin to run on the date the foreclosure deed was recorded, not on the earlier date the assignment of the mortgage on which the foreclosure was based was recorded. Even if plaintiff is correct and the statute of limitations does not bar his claims, the outcome of this matter remains unchanged because the magistrate judge further correctly determined that the motion for summary judgment should be granted on additional substantive grounds. Consequently, the court holds that the plaintiff's objection on the basis of the calculation of the limitation

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period, even if well founded, is irrelevant to the ultimate disposition of these claims.

With regard to the recommendation on the merits, the plaintiff first asserts that the defendant's motion is due to be denied because the defendants failed to provide any evidence that the assignment of the mortgage to the defendants was pursuant to the consent of David Markham, the mortgagor. The court notes, to the contrary, that the defendants provided the affidavit of Markham. Properly signed and notarized, which states:

> Thereafter, I was advised that Mr. Edwards was seeking an assignment of the mortgage that I had previously Given to the Farmers Home Administration. I gave my Consent to that assignment of said mortgage from the Farmers Home Administration to J.W.Edwards. This Assignment was given to the Farmers Home Administration and there has never been a revocation or withdrawal of that consent.

Based on the affidavit, the court finds that the defendants' motion for summary judgment was properly supported by evidence that Markham consented to and gave permission for the assignment. As the magistrate judge noted, the consent given was sufficient pursuant to the regulations governing the transaction at the time it was completed. Accordingly, the plaintiff's objection on that ground is without merit.

The plaintiff's third objection is essentially the same basis on which the plaintiff opposed the motion for summary judgment. The plaintiff asserts that "the mortgage was first paid off before the subsequent attempt to have it assigned and foreclosed.' The evidence plaintiff cites in support of this assertion is the declaration of lbert Butler, filed as an exhibit to the defendant's motion for summary judgement, and a letter from the Edwards' attorney stating that the payment was made in May of 1987. The court sees no

grounds for concluding, as plaintiff argues, that the assignment was invalid because of the "prepayment" of the amount of the underlying debt.

The plaintiff's argument, while somewhat inartfully stated, appears to be an attack on the assignment either because: (1) the payment extinguished the mortgage, thereby leaving the FmHA with nothing to assign to the Edwards, or 92) the assignment is invalid for lack of consideration because the payment preceded the assignment and there was no new consideration for it. The court sees no merit to either argument.

The Edwards apparently paid off the underlying debt in May of 1987. Under Alabama law, the payment of the underlying debt caused the Edwards to become subrogated to the rights of the mortgagee. This is true because subrogation arises as a matter of law and equity whenever one party pays the debt or encumbrance of another either at the request of the other or in order to preserve his own property or assets. Whitson v. Metropolitan Life Insurance Co., 225 Ala. 262, 142 So. 564 (1932). Furthermore, the payment of the debt necessarily would precede an assignment of the mortgage, as it was the payment that entitled the Edwards to "stand in the shoes" of the FmHA as the mortgagee and to effectuate the assignment of the mortgage with Markham's consent.

The court also finds no support for the contention that the payment of the debt by the Edwards extinguished the mortgagee's rights. It is clear under Alabama law that the payment of the underlying debt by a third-partry does not extinguish the mortgage, but, rather, works a transfer of the mortgagee's rights to the third-party. See Collins v. Forman, 230 Ala. 370, 161 So. 238 (1935); North American Life Insurance of Chicago v. Collins, 237 Ala. 17, 185 So. 375 (1938). The two obligations are separate and distinct, and the plaintiff provides no authority for an assertion to the contrary. The issue of consideration for the assignment

already has been discussed by the magistrate judge. Suffice it to say that the Edwards, having paid the underlying debt, became entitled to the assignment of the mortgage, and the passage of time between the payment and the assignment is of no consequence to the validity of the assignment. Therefore, even if plaintiff's factual allegations are correct, they do nothing to affect the validity of the assignment of the mortgage which is at issue in this case.

Consequently, having carefully reviewed and considered *de novo* all the materials in the court file, including the report and recommendation, the court is of the opinion that the magistrate judge's report is due to be adopted and his recommendation is due to be accepted. A separate order will be entered in accordance with this finding.

DATED this 27 day of April, 2000.

S/Lynwood Smith
C. LYNWOOD SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HOWARD S. ROSS , Plaintiff
v. Case No.CV-98-S-2683-NE
J.W. EDWARDS, et al., Defendants,

ORDER

The magistrate judge filed his report and recommendation in this cause on March 27, 2000, recommending that the motion for summary judgment filed by defendants Clara Edwards and the Estate of J.W. Edwards, deceased, be granted and the claims against them dismissed with

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prejudice. Plaintiff filed objections to the report and recommendation on April 11, 2000.

Have carefully reviewed and considered de novo all the materials in the court file, including the report and recommendation and the plaintiff's objections thereto, the Court is of the opinion that the magistrate judge's report is due to be and is hereby ADOPTED and his recommendation is ACCEPTED. Accordingly, the Court EXPRESSLEY FINDS that there are no genuine issues of material fact and that the above-named defendants are entitled to judgement as a matter of law. Defendant's motion for summary judgment, therefore, is due to be and the same is hereby GRANTED, and this action against them is DISMISSED WITH PREJUDICE.

The case is again REFERRED to the magistrate judge for further proceedings with respect to the claims against the remaining defendants.

DATED this 27 day of April, 2000.

S/Lynwood Smith
C. LYNWOOD SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HOWARD S. ROSS , Plaintiff
v. Case No.CV-98-TMP-2683-NE
J.W. EDWARDS, et al., Defendant,

MEMORANDUM OPINION

APPENDIX D

This cause came before the court on two motions for summary judgment. The first was filed June 6, 2000, by defendant Lois Ford. and the second on August 16, 2000, by defendant United States of America. The plaintiff has not filed any evidence or argument in opposition. The parties have consented to the exercise of jurisdiction by the undersigned pursuant to 28 U.S.C. $ 636 (c).

A motion for summary judgment previously was filed by Clara Edwards and the Estate of J.W. Edwards (the Edwards). The undersigned magistrate judge filed his report and recommendation on March 27, 2000, recommending that the Edwards' motion for summary judgment be granted and the claims against the Edwards be dismissed with prejudice. Plaintiff filed objections to the report and recommendation on April 11, 2000, and United States District Judge C. Lynwood Smith, Jr. entered a memorandum opinion and order on April 27, 2000, dismissing the claims against the Edwards with prejudice. The Plaintiff filed a motion to reconsider and vacate the order, which was denied by order dated May 31, 2000.

The two instant motions for summary judgment are based upon the same undisputed facts and raise the same grounds for dismissal as did the Edwards' motion for summary judgment: (1) that teh assignment of the subject mortgage and foreclosure of the subject property were valid; and (20 that the statute of limitations bars plaintiff's claims. The reasons that the Edwards' motion prevailed are set forth in great detail in the Report and Recommendation and in the Memorandum Opinion. The reasons will not be set forth again here. Suffice it to say that the Government defendants and Lois Ford also are entitled to summary judgment in their favor as to all of the plaintiff's claims because the assignment of the mortgage was proper, because the foreclosure upon the property was proper, and for the separate and independent reason that the claims are time-barred.

Consequently, having carefully reviewed and considered all the materials in the court file, the court is of the opinion that the motions for summary judgment are due to be granted. A separate order will be entered in accordance with this finding.

DATED this 15th day of June, 2001.

S/T.MICHAEL PUTNAM
T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HOWARD S. ROSS , Plaintiff
v. Case No.CV-98-TMP-2683-NE
J.W. EDWARDS, et al., Defendant,

ORDER GRANTING SUMMARY JUDGEMENT

This action is before the court on motions for summary judgment filed by defendant Lois Ford and defendant United States of America. TRhe parties have consented to the exercise of jurisdiction of the undersigned pursuant to 28 U.S.C. $ 636 (c).

Based upon the pleadings, arguments, and evidence on file, and for all the reasons setr forth in the Memorandum Opinion entered herewith, the court determines that there exists no genuine issue as to any material fact regarding any of the plaintiff's claims against these defendants and that defendants' motions for summary judgment (court documents nos. 32 and 35) are as a matter of law due to be and are hereby GRANTED, and the claims are DISMISSED WITH

PREJUDICE, Accordingly, all of the plaintiff's claims in this actions are hereby DISMISSED WITH PREJUDICE.

DATED this 15th day of June, 2001.

S/T.MICHAEL PUTNAM
T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE

APPELLANT/PLAINTIFF'S BRIEF ON APPEAL - SECTIONS "SUMMARY OF THE ARGUMEMENT" AND "ARGUMENT AND CITATIONS OF AUTHORITY"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Howard S. Ross, Appellant-Plaintiff,
v.
The estate of J.W.Edwards, Clara Edwards, Defendants, and William Ford, Lois Ford, The United States Department of Agriculture, Appellees-Defendants.

BRIEF OF APPELLANT

SUMMARY OF THE ARGUMENT

1) Summary dismissal of a case for lack of response by the non-movant plaintiff when a response was filed and is in the record is either an abuse of the judge's discretion or a clerical mistake on his part.

2) In order to be valid, an assignment has to be made at the instant of the payment of a debt or an agreement to assign be made. In this case there wasn't even an intention to assign. The fact that it is later determined that an assignment or

subrogation would be more beneficial to the payor is not enough to change the original intent. In order to be subrogated to the mortgagee, the payor must not have intended to payoff the debt except to protect his interest in the property. And to gain the right of subrogation he must aassertively plead it in court. The payor filed suit for redemption in a state court that was empowered to resolve all issues regarding the property and was given a credit for the payment on the price that was fixed for redemption - but no subrogation. As much as Alabama law of issue preclusion prevents them from subsequently litigating for subrogation, so must the federal court. Furthermore the federal district courts are jurisdictionally barred from reviewing the state court judgement by the Rooker-Feldman doctrine.

3) The Code of Federal Regulations clearly requires both the request and consent of the borrower before his USDA rural development mortgage can be transferred. Since the loan was already paid off, requesting a new holdere of the loan would be moot. Since the borrower had no interest in the propery due to the foreclosure of the second mortgage he could not lawfully control the encumbrances upon it.

4) The Alabama ten year statute of limitation on the recovery of real estate begins to accrue when adverse possession begins and an adverse deed is recorded.

ARGUMENT AND CITATIONS OF AUTHORITY

1) The judge has stated in his opinion that "the plaintiff has not filed any evidence or argument in opposition.: (Doc.39 Pg.1). Ross has filed an answer and affidavit that respods to all the issues raised by both Ford and USDA in their motions for summary judgement (Doc.33). In order to dismiss under Feder Rule of Civil Procedure 56(c) summary judgement is

proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a mattwer of law." Fed.R.Civ.P.56(c). Even if the non-movant's affidavit of facts is unusual, the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (S.Ct. 1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id at 249. "Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the functions of the jury , and therefore the evidence of the non-movants is to be believed and all justifiable inferences are to be drawn in their favor". Anderson, 477 U.S. at 255. As stated by the eleventh circuit on summary judgements, "In this case, we view the evidence produced by Barfield, the non-moving party, and all the factual inferences arising from it, in the light most favorable to him." Barfield v. Brierton, 883 F.2d 923, 934.

2) The debt owed on the mortgage to USDA that is the subject matter of this case was paid off by Edwards on May 29, 1987 (Doc.24 Pg.1,3) and accepted by the USDA without any assignment or agreement to assign (Doc.33 Pg.3). "where the creditor accepts payment from a stranger to the contract, such payment operates as an extinguishment of the debt so far as the creditor is concerned." Manhattan Life Ins. Co. v. Hereford, 55 So. 497, 497 (Ala. 1911). The attempted foreclosure of a paid off mortgage is void. "We have also held that if the debt secured by a mortgage was fully paid prior to foreclosure the sale was void." Robino v. Green, 119 So.2d 897,899 (Ala. 1960). At the time of the payoff there was no intention of either party to assign the debt (Doc.33

Pg.3,4). The payments were currently being made so there was no necessity to pay the debt (*Doc.24 Pg.1,2). Edwards had no intention of purchasing the mortgage. His intention was to purchase the property at an inequitable price under the mistaken legal belief that he would be lawfully entitled to the property by paying off the first mortgage just as Ross had paid off the second (Doc.33 Pg.3,4). "In order to constitute an assignment "[t]here must be an affirmative showing of an intent to assign.". Strickland & Co. v. Lesesne & Ladd, 160 Ala. 213, 49 So. 233 (1909). "The owner must do or say something which would indicate a transfer of his claim or right to do another." 160 Ala. at 217, 49 So.233 (emphasis added)." Russell v. Birmingham Oxygen Serv., Inc., 408 So.2d 90, 93 (Ala.1981)." A.B./Wildwood Ltd., In re, 2000 WL 1718630 ** 4 (Ala.2000). The assignment must be done contemporaneously. "There must be enough done, however, to evince an intention to transfer or assign eo instante, as distinguished from a mere offer or purpose to do so." E.Strickland & Co. v. Lesesne & Ladd, 49 So. 233, 234 (Ala. 1909). Furthermore the district xcourt argued on its own initiative that Edwards was subrogated to the rights of the mortgagee (Do.25 Pg.4,5) even though there have been no pleadings for subrogation in any court. Subrogation can only be granted by judicial proceedings. "" As the California Supreme Court has held "'[A] surety by payment does not ipso facto subrogated to the rights of the creditor, but only acquires a right to such subrogation, and ... before the substitution or equitable assignment can actually take place he must actively assert his equitable right thereto. It is not a substantive tanhgible right of such nature and character that it can be seized and held and enjoyed independently of judicial procedings.'" Offer v. Superior Court of San Francisco, 194 Cal.114, 117, 228 P.11, 12 (1924)'" U.S. v. California, 113 S.Ct. 1784 (1993). And it must be assertively plead. "... this court held that "subrogation is an affirmative

action or defense, which must be pleaded by the party claiming it."" Christburgh v. Anderson, 66 P.2d 902, 906 (Okl.1937). Edwards previously filed suit and brought Ross before a state court empowered to resolve all issues between them regarding the property. That court declared the mortgage to have been paid and a credit given to Edwards with the right to redeem the property at a fixed price (as they had requested) (Doc.33 Pg.4,5,15). Alabama law prevents the defendants from subsequently litigating that matter by issue preclusion. "A judgement which is regular on its face and indicates subject matter and personal jurisdiction is conclusive on collateral attack." Williams v. First National Bannk, 384 So.2d 89, 94 (Ala.1980). That bars that issue from being raisaed in the federal district court which is already jurisdictionally barred from reviewing the state court judgement itself by the Rooker-Feldman doctrine. And while the intention to payoff the mortgage by Edwards may have been misguided, it was their own doing and their intention to pay off the debt inorder to purchase the rights to ther property at a less than equitable price and not to be subrogated or assigned (Doc.33 Pg.3,4,6,9). Furthermore, "This remedy is not a matter of strict right, but of equitable origin, depending in its application upon the facts of each particular case. Nor is it an universal remedy for parties who have lost their money. 60 Corpus Juris 706. And to justify its application, it must appear the enforcement of the doctrine will not only best serve the substantial purposes of justice, but also the true intention of the parties." Duke v. Kilpatrick, 163 So. 640, 641 (Ala.1935). ""If the facts and circumstances show definitely that at the time of payment the right of subrogation was not intended to be exercised, but on the contrary, that the purpose was not to keep the debt alive but to extinguish it, then the right of subrogation cannot be held to exist." This court in the Pendergraft Case, supra, held: "Whether payment of the note by a surety operates as

extinguishment of the note or a mere purchase thereof is a question of intention." In the body of the opinion it was said: ""If the note is simply paid and nothing be said or done to show a contrary intendment, an extinguishment will be presumed."" Christburgh v. Anderson, 66 P.2d 902, 906. ""The mere fact that plaintiff's interest would have been better protected by permitting the lien to stand will not control against the intention clearly established. The law will permit a party in such a case, as in others, to act and contract in a manner which would not result to his interest" Weider v. Thompson, 69 Iowa 38, 28 N.W. 422" Wragg v. Wragg, 226 N.W. 99, 102 (Iowa 1929). "A court of equity will not assist one in extricating himself from circumstances which he has created." Hill v. Lumus, 123 So.2d 365 (Fla. 1960). "Equity will relieve, in general, only those who could not well have relieved themselves." Pomeroy's Equity Jurisprudence. After paying the debt, Edward actions were inconsistent with those of a mortgagee. They began to collect rent from the tenant, under Ross' objection. When Ross filed for eviction of the tenant in September of 1987, Edwards' attorney provided the defense at trial instead of turning the money over to Ross to stop the eviction. The tenant was subsequently evicted and possession returned to Ross (Doc.33 Pg.3,4,6,7). The Appellants excerpts are from the transcript of the court reporter who was specially employed for that district court eviction trial due to its highly unusual nature. Furthermore, in order to gain subrogatrion, "One who comes intoi equity must do so with clean hands, and equity will not aid one in extricating himself or herself from hurt full consequences when his or her acts are reprehensible and directly connected with the subject matter of the litigation.: Owens v. Owens, 201 So.2d 396, 398(Ala.1967). After the eviction effectively denied Edwards the right to collect rent, they changed their position in November 1987 by obtaining the assignment

document from USDA (Doc.23 Pg.2). To allow subrogation would be to excuse their behavior.

3) Transfer of a USDA rural home mortgage is governed by 7 CFR 1965.128, which requires both the request and consent of the borrower. The original borrower, Markham gave consent but did not request the transfer. As the court noted in its memorandum opinion that the Markham affidavit states:"Thereafter, I was advised that Mr.Edwards was seeking an assignment of the mortgage that I hasd previously given to the Farmers Home Administration. I gave my consent to that assignment of said mortgage from the Farmers Home Administration to J.W.Edwards. This assignment was given to the Farmers Home Administration and there has never been a revocation of that consent." (Doc.25 Pg.3) And it would be ludicrous to construct a request of the transfer - there would be no reason for Markham to make such a request since the consent in November 1987 (Doc.23 Pg.2) was well after the payoff of the debt, and he didn't make any subsequent payments to Edwards on the debt (Doc.24 Pg.1,3). The intention of that section of the CFR was to provide a method for borrowers to request a change of the holder of their mortgage to a private institution of their choosing - not to allow those who no longer have an interest in the property to give another party the power of sale of foreclosure. Due to the second mortgage foreclosure, Markham no longer owned the property and "when the mortgagor disposes of the mortgaged premises either by his own deed or by operation of law, he loses all control over them His personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises, thenceforth a mere stranger. With respect to the property placed beyond his control he has no personal privelege. He

cannot at his pleasure affect the interest of other parties." White v. Rosenthal, 35 P.2d 154, 156 (Cal.1934).

4) This is an action for the recovery of land and is governed by Alabama Code $6-2-33 (1975) which sets forth a 10-year statute of limitations. "This statute doesn't begin to run until adverse possession begins." Goodson v. Morrow, 547 So.2d 856,858 (Ala. 1989). "(a) Adverse possession cannot confer or defeat title to land unless: "(1) The party setting it up shall show that a deed or other color of title purporting to convey title to him has been duly recorded in the office of the judge of probate of the county in which the land lies for 10 years before the commencement of the action;"" Id. at 858. Adverse possession by Edwards did not begin until September 24, 1988 (Doc.33 Pg.5) and the deed was recorded on September 15, 1988. The instant action was filed within 10 years of both dates on September 10, 1998 (Doc.23 Pg.3).